Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: K. G.[1]
Date of Birth: [redacted]

Dates of Hearing: 11/4/2016, 12/8/2016, and 1/5/2017
Closed HEARING
ODR File No. 18242-16-17

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Elizabeth Kapo Esq. 2123 Pinehurst Road Bethlehem, PA 18018
Local Education Agency Berks County IU/EI Program 1111 Commons Blvd. Reading, PA 19612-6050	LEA Attorney Christina Stephanos Sweet, Stevens, Katz & Williams LLP 331 Butler Avenue New Britain, PA 18601
Date Record Closed:	January 5, 2017
Date of Decision:	January 26, 2017
Hearing Officer:	Charles W. Jelley Esq. LL.M

[1] This action ODR FILE #18242 is related to ODR FILE #18241-1617 KE. The Children are siblings. In completing the Cover Sheet above the hearing officer inadvertently misspelled the Child's name. The Cover Sheet is now corrected to reflect the proper spelling of the Child's name. No other parts of the Decision or Order were changed.

Background

This case arises from a Complaint filed by the Berks County Intermediate Unit (BCIU), the Local Education Agency (LEA) to support the appropriateness of its reevaluation of an eligible young Child (Child). The IU's previous evaluation identified the Child as a person with Autism[2] who had previously qualified for Part-C services. The IU evaluation, then and now identifies the Child as a person with Autism. Shortly after the initial evaluation, the Child began receiving preschool (ages 3 to 5) special education services from the IU.[3]

In the spring of 2016, the IU reevaluated the Child. After the parties reviewed the reevaluation report (RR) and established the Child's continued need for services, the Grandparents[4] requested an Independent Educational Evaluation (IEE). The request focused on all of the domain areas addressed by the IU evaluation team. In particular, the Grandparents focused on the need for an independent Physical Therapy, Occupational Therapy, and an Assistive Technology evaluation. After the IEE request was reviewed, the IU filed a timely due process complaint to support the appropriateness of its reevaluation.

Hearing Session One - Procedural Objection

IU contends after hearing the Grandparents' opening statement the Grandparents expanded their IEE request to developmental areas not mentioned in the IEE request. After a careful and thoughtful review of the Grandparents' letter, the IU denial of the IEE request and the IU complaint, I find the Grandparents did clearly express a disagreement with all of the developmental areas assessed by the IU. Assuming *arguendo* IU was somehow prejudiced, the hearing officer offered, and the IU agreed to present rebuttal evidence if necessary after the Grandmother's testimony. The IU called six witnesses, while the Grandparent was the Child's only witness; under these circumstances the rebuttal testimony removed any alleged

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[2]But for the cover page of this Decision, in the interest of confidentiality and privacy, the young Child's name and gender, and other potentially identifiable information are not used in the body of this decision. The same day the Grandparents filed this Complaint, they also filed a second complaint for this Child's sibling. The sibling attends the same preschool, and though they are in different classes, each Child earned virtually the same scores on the same set of assessments.

[3] Commendably, both parties agreed to use the same exhibits in this matter, which avoided an unnecessarily long documentary record. Although there are effectively joint exhibits in this matter, they are designated by the letter "J" followed by the exhibit number. References to the transcript are designated by the letters "NT" followed by the page number. The Grandparent submitted one exhibit; that exhibit is designated as "P#1."

[4] The Child has lived with the Grandparents since birth. The IU, for all times relevant, has always treated the Grandparents as the Child's Parents 34 C.F.R. §300. 30(a)(4).

prejudice. Accordingly, I find the LEA, as the moving party, was not prejudiced in presenting their case in chief. Any alleged prejudice was waived once the IU presented the rebuttal evidence.

Hearing Session Two - Procedural Objections

At the second hearing session, two procedural matters arose prior to the presentation of phone testimony from a former IU speech therapist. The Parties had previously agreed to take the witness' testimony by phone. During the hearing officer's standard witness phone instructions, the witness disclosed that several of the pages in the agreed to evidence exhibit binder contained notes and were highlighted (NT pp.66-93). As the witness was testifying by phone, I could not observe the witness to gauge what effect, if any, the markings could have on the testimony. Next, although the IU suggested that they could provide copies of the marked pages for review, the Grandparents objected based upon the 5-day IDEA due process mandatory disclosure of exhibits rule. 34 CFR §300.512 (b)(1). The Child's evaluation report, Exhibit J#3, was already part of the record. After hearing argument from both sides, and after a careful and thoughtful review, I granted the Grandparents' objection. The variance between the exhibits of record and the exhibits in the possession, of the telephone witness, created a fundamentally unfair situation. Therefore, after careful consideration, I granted the Grandparents' objection. I find that the telephone testimony would have tainted the fact-finding process.

Next, IU sought to introduce two additional documents. The first document relates to speech services, while the second is a blank form they contend was completed and sent to the Grandparents describing the proposed individual reevaluation assessments. Once again, the Grandparents objected contending the IU did not follow the mandatory 5-day rule for each document. After hearing arguments from both sides, I granted the Grandparents' motion and excluded both documents. 34 C.F.R. §300.512 (b)(1).

The documentary evidence and testimony produced over the two hearing sessions is preponderant that the IU's reevaluation was partially appropriate and partially incomplete, insufficient and inappropriate. While the reevaluation assessed the Child in all six of the required developmental areas, I find the IU's evaluation fell short regarding the Child's Occupational Therapy Sensory Processing needs, Assistive Technology needs, and the Child's Physical Therapy gross motor needs. Accordingly, I find the LEA did not meet its burden of proof an appropriate Order is attached.

ISSUE

Did the IU Early Intervention Program conduct an in-depth, sufficient comprehensive, evaluation of the Child in all areas of development strengths and needs?

If the IU Early Intervention Program did not conduct an appropriate evaluation, should the IU Early Intervention Program be ordered to fund an independent educational evaluation in one or more developmental areas as requested by the Grandparents?

Findings of Fact

1. The Child is preschool aged, resides within the IU, and is eligible for preschool special education services (J #3).
2. Previously, in accordance with federal and state standards, the IU identified the Child as eligible for specially-designed instruction 34 C.F.R. §300.8(a)(1),(c) (1); 22 Pa. Code §§14.101; 14.102 (2) (ii); 14.153 (J#3).
3. The Child receives IU early intervention services in a center-based preschool classroom four days a week for a half-day session each day (J#3).
4. On February 6, 2016, the IU sent, and the Grandparents signed a Permission to Reevaluate (PTRE) the Child (J#2). The PTRE provides that "… the reevaluation is currently recommended in order to determine continued eligibility for preschool special education services and to provide updated information on [redacted] development" (J#2).
5. The PTRE form included an attached list of the specific assessments and the applicable Procedural Safeguards (J#2). After a careful, deliberate and extensive search, the IU was not able to produce the attachment (NT p.192).
6. A part of the evaluation, a IU school psychologist, obtained input about the Child's background, medical history, developmental history, concerns about the Child from the Grandparent, as well as information from teachers and service providers with respect to the Child's services/progress, and behaviors of concern (J#3).
7. To assess the Child's cognitive development, the preschool teacher completed the Battelle Developmental Inventory 2nd Edition (BDI-2) (J#2 p.3). In the area of cognitive development, the Child's BDI-2 developmental quotient of 55 falls in the significant developmental delay range. Developmental quotient scores in the 51 to 65 range indicate the Child has an age equivalent score of one year to one year and nine months (J#2 p.11). The Cognitive domain consists of three areas: Attention and Memory,

Reasoning and Academic Skills and Perception and Concepts. In all three domains, the Child had learning difficulties such as attending to a task in a small group, stacking items, and identifying objects by use or sorting colors (J#3 p.11). The report notes the Child can remain on task for three (3) minutes (J#3 p.11).

8. The preschool teacher also administered the Verbal Behavior Milestones Assessment and Placement Program (VB- MAPP) (J#2 p.12). The VB-MAPP assessment contains 170 measurable learning and language milestones that are sequenced and balanced across three developmental levels. The VB-MAPP also includes the Milestones Assessment in Early Echoic Skills Assessment Subtest. The VB-MAPP evaluates 24 common learning and language acquisition barriers faced by children with autism or other developmental barriers (J#2 p.23).
9. The VB-MAPP assessment results indicate the Child demonstrates skills in the birth to eighteen month range (J#3 p.12). The Child is not yet able to label objects (J#3 p.12). As a form of functional communication, the Child is learning to pick up a picture and give it to an adult (J#3 p.12).
10. The Child's labeling, responding, visual perception skills, independent play, social behavior, social play, motor imitation, echoic, spontaneous vocalization scores all fall within the birth to eighteen month range (J#3 p.12).
11. The Speech Therapist administered the Rossetti Infant-Toddler Language Scale and the Preschool Language Scale-Preschool Language Scale 5th Edition (PLS-5) (J#2 p.14, p.24). On the PLS-5, the Child's scores fell at the 1st percentile. The Child's standard scores were more than 1.5 standard deviations below the mean suggesting a language delay (J#3 pp.14-15, pp.23-24). The Child earned a Standard Score of 50, which corresponds to a percentile rank of one (1) on the PLS-5 Expressive Communication subtest (J#3 p.13). The Child's scores fall in the significantly below average range (J#3 p.13).
12. On the PLS-5 Total Language Score subtest, the Child's earned a Standard Score of 50, which corresponds to a percentile rank of one (1) (J#3 p.14). The Student was not able to demonstrate the following PLS-5 skills, imitate a word, imitate a turn-taking or social routine, use gestures and vocalization to request objects, and demonstrate joint attention (J#3 p.14). These scores indicate a significant delay in both expressive and receptive communication (J#3 p.13). The Child's scores fall in the significantly below average range (J#3 p.14).
13. The Speech Therapist notes the Child has significant expressive and receptive language delays that inhibit development of functional communication and play skills (J#3 p.15).

14. The Speech Therapist testified that based on the Child's level of attention and fine motor control it was her opinion, that at the current time, she was would not recommend an Assistive Technology Assessment (AT) (NT pp77-117; pp.135). The IU did not evaluate or provide the Child with a trial device to assess the Child's AT needs (NT pp.77-117; pp.135). The evaluation report does not include any objective data of a formal Assistive Technology assessment from the IU trained evaluator (J#3; NT p.33).
15. The Child earned a developmental quotient of 55 on the Personal-Social domain. The Personal-Social domain consists of activities such as interacting with peers and expressing emotions. The Child's score of 55 corresponds to a percentile rank of one (1) (J#3 p.16). For example, the Child does not respond when called, does not imitate play skills with other children, does not show enjoyment when an adult reads a story and does not greet familiar adults (J#3 p.16).
16. Information about the Child's gross motor development was obtained through clinical judgment by the Physical Therapist and teacher observation. The teacher's observations were scored and recorded using the Developmental Assessment of Young Children-2nd Edition Gross Motor Subdomain. A Standard Score of 78 corresponds to at least a 1.5 standard deviation below the mean of 100 which indicates a delay (J#3 p.17). The Student earned a Gross Motor Subdomain score of 81 at the 10th percentile (J#3 p.23). The teacher reports the Child toe walks. The teacher and the Grandparent report the Child toe walks up steps placing one foot on each step with a handrail; and descends stairs, toe walking, with verbal and physical prompting, with the use of a handrail, placing one foot on each step (J#3 p.17). The Grandparents and the teachers report the Child falls when walking, and walks down stairs looking upwards (J#3 p.17). The Child demonstrates limited environmental awareness (J#3 p.17). The Physical Therapist testified, that although the Child toe walks, and earned a borderline standard score of 81, at the 10th percentile, based upon her clinical judgment and the single DAYC-2 score, the Student did not qualify for physical therapy (NT 169-170; J#3 p.17).
17. The Child's fine motor, visual motor, and sensory motor skills were assessed by the Occupational Therapist. The Occupational Therapist reports the Child occasionally picks up objects with an immature raking grasp pattern, holds crayons with a pronated fisted grasp, however, the Child is able to complete grasp and releases activities (J#3 p.17-18).
18. The Occupational Therapist administered the Peabody Motor Scale. The Peabody is a standardized assessment designed to measure a child's independent functioning in his or her environment. The Peabody Motor Scale evaluates self-help skills including toileting, feeding, dressing, and

personal responsibility. The Child earned a Fine Motor Quotient Standard Score of 50 and a percentile rank of less than 1 (J#2 p.24).

19. The Occupational Therapist also administered a portion of the DAYC-2, to assess the Child's self-help skills, toileting, feeding, dressing, and personal responsibility. A Standard Score of 78 or less indicates a 25% delay or 1.5 standard deviations below the mean. The Child earned a Standard Score of less than 50 and a percentile rank of less than 1 (J#2 p.24).

20. The Occupational Therapist used the Sensory Processing Measure-Preschool Assessment Tool (SPM-P) to assess the Child's sensory needs (J#3 p.22). The two questionnaires, when scored, provide a broad perspective of the Child's sensory needs in the preschool classroom and the home. Contrary to test maker's instructions, in this instance, the Occupational Therapist did not give the questionnaire to the Grandparent. The Child's SPM-P observation was completed by the teacher and then scored by the Occupational Therapist. The choices of responses range from never, occasionally, frequently and always on 75 questions (J#3 p.22). The RR states the Child resists in engaging in hand washing activities and is occasionally distressed by messy play (J#3 pp.22). The evaluator notes that the Child has been observed to engage in self-stimulatory behaviors that are frequent and changing (J#3 pp.18-22). Oftentimes the Child spins and twirls around the room ((J#3 p.18).The Child has recently begun to display behaviors that may or may not be a result of a sensory processing needs (J#3 p.18). For example, the staff reports the Child is now running into others and head butting others (J#3 p.19). The Child cannot problem solve, is easily distracted and displays minimal play skills (J#3 p.16). Although the Child is five (5) years old, the Child is not toilet trained and does not indicate the need for a diaper change (J#3 pp.19-20). The Occupational Therapist reports the Child's sensory processing differences "directly limits purposeful engagement in classroom activities" (J#3 p.18). The Child distractibility requires consistent prompting to follow directions and engage in tasks (J#3).

21. The IU's school psychologist assessed the Child's developmental needs and collected data as part of Functional Behavior Assessment (FBA) (J#3 pp.19-20).

22. The FBA was completed to gather specific information/data on the antecedents, behaviors, and consequences supporting the behaviors that interfered with the Child's learning (J#3 p.23). The FBA objectively described the frequency of a series of challenging behaviors like dropping to the floor while walking, scratching the teachers, pulling hair and wandering around the room (J#3 p.17).

23. As part of the FBA over a twelve (12) day period, the staff collected data 333 times (J#3 p.19). The FBA data demonstrates that, on average roughly ten (10) times a day, the Child throws objects for about 3% of the day (J#3 p.19). Roughly, seven (7) times a day, the Child head butts someone for 2% of the day (J#3 p.19). Thirty-six (36) times a day, the Child self-stimulates for 11% of the school day (J#3 p.19). Fifty-three (53) times a day for roughly 16% of the day, the Child tries to elope from the staff (J#3 p.19). Roughly 113 times a day for about thirty-four (34) percent of the time, the Child attends the preschool, the Child performs some combination of the interfering behaviors listed above (J#3 p.19)
24. After reviewing the multiple assessemnt tools, the evaluation team concluded the Child has a developmental delay and was in need of specially-designed instruction as defined in the IDEA and Chapter 14 (J#2 p.30).
25. The Grandparents presented a one-page exhibit from a private Physical Therapist. The one-page report from the private Physical Therapist reported that the Child was reevaluated in August 2016 (P#1). The private evaluator reported the Child had heel cord tightness, gait abnormality, and decreased coordination (J#1). The report was prepared after the IU evaluation and was not considered at the time of the IU's Physical Therapist's evaluation or by the evaluation team (J#1).

Applicable Legal Principles and Conclusion of law

Burden of Proof

The burden of proof is composed of two considerations, the burden of going forward, and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact. In *Schaffer v. Weast*, 546 U.S. 49, (2005), the court held that the burden of persuasion is on the party that requests relief in an IDEA case. The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992). This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *Id.*

Credibility and Persuasiveness of Witness Testimony

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 Pa Code §14.162 (requiring findings of fact); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact).

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. In the course of doing so, hearing officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.[5]

Thus, all of the above factual findings are based on a careful, deliberate, and thoughtful review of the transcripts, a careful reading of all of the exhibits and a direct observation of each witness; therefore, the decision is based upon a preponderance of the evidence presented. While some of the material evidence is circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole is preponderant. On balance, despite slight inconsistencies, the hearing officer found all of the witnesses' testimony represents their complete recollection and understanding of the events. I conclude, therefore, that I can derive inferences of fact from the testimony.

Federal IDEA and State Reevaluation Requirements

The IDEA statute and regulations require an initial evaluation, provided in conformity with statutory and regulatory guidelines, as the necessary first step in determining whether a child is eligible for special education services and in developing an appropriate special education program and placement. 20 U.S.C. §1414; 34 C.F.R. §300.8(a). After a child is determined to be eligible, the IDEA statute and regulations provide for periodic reevaluations, which "may occur not more than once a year unless the parent and public agency agree otherwise; and must occur at least once every three (3) years, unless the parent and the public agency agree that an evaluation is unnecessary". 20 U.S.C. §1414(a)(2)(B)(i), (ii); 34 C.F.R. §300.303(b). LEAs,

[5] *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution, Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003).

however, also have an obligation to "ensure that a reevaluation of each child with a disability is conducted" at any time "the public agency determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation". 20 U.S.C. §1414(a)(2)(A)(i), (ii); 34 C.F.R. §300.303(a).

The standards for an appropriate evaluation are found at 34 C.F.R. §§300.304-300.306. The evaluation standards require the LEAs to (1) "use a **variety** of assessment tools; " (2) "gather relevant functional, developmental and academic information about the child, including **information from the parent**;" (3) "Use **technically sound instruments**" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any **single measure** or assessment as the **sole criterion**" for a determination of disability or an appropriate program. 34 C.F.R. §300.304(b)(1-3).

In addition, the measurement tools used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments. The evaluation must assess the child in all areas related to the suspected disability. The evaluation must be "**sufficiently comprehensive** to identify all of the child's special education, and related service needs", and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii-iv), (2), (4), (6), (7). (emphasis added).

The regulations also permit the LEA to pay for certain medical evaluations, when necessary, provided that the evaluations are limited to "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and other services". 34 C.F.R. §.34(c)(5). Medical evaluations are required under the IDEA to the extent that they are necessary for diagnostic purposes. The inverse is also true; the medical services of a licensed physician for other purposes, specifically for medical treatment, are not related services under the IDEA. *Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3d Cir. 2009).

Once an evaluation or reevaluation is completed, a group of qualified LEA professionals and the child's parents determine whether the student is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the LEA is required to "Draw upon information from a variety of sources", including those required to be part of the assessments, and they must assure that all such information is **"documented and carefully considered**". 34 C.F.R. §300.306 (c)(1). (emphasis added).

Independent Educational Evaluations Requirements

The IDEA and the companion state regulations provide that Parents have the right to obtain an independent educational evaluation (IEE). At times, if the parents elect to pursue a private evaluation, if the private evaluation meets the IEE criteria of the LEA, and parents share it with the LEA, the LEA must consider the IEE in making decisions concerning the child. 34 C.F.R. §300.502(a), (b)(3), (c)(1).

Parents have two alternative avenues to obtain a publically paid IEE. First, they can obtain an IEE at public expense if they disagree with an evaluation obtained by the LEA and the LEA agrees to fund the independent evaluation. Second, if the LEA's evaluation is found inappropriate by the decision of a hearing officer after an administrative due process hearing, the hearing officer can order the LEA to fund the costs of the IEE. 34 C.F.R. §300.502(b)(1)-(2)(ii).

Once a parent has requested an IEE, the LEA "must, without unnecessary delay", file a due process complaint to show that its evaluation is appropriate or assure that the IEE is provided. 34 C.F.R. §300.502(b)(2)(i), (ii). Next, the LEA must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2); *Letter to Bluhm,* 211 IDELR 2237 (OSEP 1980).) Upon receipt of the request, the LEA must also provide parents with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. *(Letter to Parker,* 41 IDELR 155 (OSEP 2004); 34 C.F.R. §300,502(a)(2)). When the LEA elects to enforce its independent evaluation criteria, the LEA must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. *(Id.)* In summary, under 34 C.F.R. §300.502(b)(1), a parent has the right to an IEE at public expense, subject to 34 C.F.R. § 300.502(b) through (e). Once the parent requests the IEE, the LEA must either grant the request or initiate a hearing; either way, the LEA must provide the parents with a list of evaluators that meet thee LEA's criteria. *Id.*

Pennsylvania Reevaluation and IEE Requirements

With respect to evaluations of young children, Pennsylvania special education regulations impose additional requirements for procedurally and substantively appropriate evaluations. Generally, and specifically, 22 Pa. Code §14.123 provides as follows:

(a) a group of qualified professionals, which reviews the evaluation materials to determine whether the child is a child with a disability under 34 C.F.R.

§300.306 (relating to determination of eligibility), shall include a certified school psychologist when evaluating a child for autism, emotional disturbance, mental retardation, multiple disabilities, other health impairments, specific learning disability or traumatic brain injury.

(b) In addition to the requirements incorporated by reference in 34 C.F.R. §300.301 (relating to initial evaluations), the initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 calendar days after the agency receives written parental consent for evaluation, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted.

(c) Parents may request an evaluation at any time, and the request must be in writing. The school entity shall make the permission to evaluate form readily available for that purpose. If a request is made orally to any professional employee or administrator of the school entity, that individual shall provide a copy of the permission to evaluate form to the parents within 10 calendar days of the oral request.

(d) Copies of the evaluation report shall be disseminated to the parents at least 10 school days prior to the meeting of the IEP team unless this requirement is waived by a parent in writing.

The Pennsylvania regulations that relate to providing special education to young children further provide as follows in 22 Pa. Code §14.153:

Notwithstanding the requirements in 34 C.F.R. §300.122 (relating to evaluation):

(1) Evaluations shall be conducted by early intervention agencies for children who are thought to be eligible for early intervention and who are referred for evaluation.

(2) Evaluations **shall be sufficient in scope and depth to investigate** information relevant to the young child's suspected disability**, including physical development**, cognitive and **sensory development**, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's perceived strengths and needs **which will enhance the child's development**.

(3) The assessment must include information to assist the group of qualified professionals and parents to determine whether the child has a disability and needs special education and related services.

(4) The following time line applies to the completion of evaluations and reevaluations under this section: (i) Initial evaluation or reevaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 calendar days after the early intervention agency receives written parental consent. 34 C.F.R. §300.303 (relating to reevaluations), a reevaluation report shall be provided within 60 calendar days from the date that the parental consent for reevaluation was received. (iii) Reevaluations shall occur at least every 2 years.

(5) Each eligible young child shall be evaluated by an MDT, to make a determination of continued eligibility for early intervention services and to develop an evaluation report in accordance with the requirements concerning evaluation under §14.123 (relating to evaluation), excluding the provision to include a certified school psychologist where appropriate under §14.123(a). (emphasis added)

Application of Applicable Legal Principles

Is the IU's evaluation sufficient in scope and depth to investigate and enhance the child's development in all areas of unique need?

The Pennsylvania regulations provide greater specificity not otherwise found in the federal regulations. The Pennsylvania regulations, unlike the IDEA regulations, require that the "evaluations shall be sufficient in **scope and depth** to investigate information relevant to the young child's suspected disability, including **physical development**, cognitive and **sensory development**, learning problems, learning strengths educational needs, **communication development**, social and emotional development, self-help skills and health considerations, as well as an **assessment of the family's perceived strengths and needs which will enhance the child's development**". 22 Pa Code §14.153(2) (emphasis added).

Any analysis of the Student's RR requires a review if the IU assessed the Child in all developmental areas. Next, like the IDEA regulations, the assessment protocols used must be "technically sound instruments" used "to determine factors such as cognitive, behavioral, physical, and developmental factors which contribute to the disability determination".

The federal and state regulations require the evaluation team to refrain from using "any single measure or assessment as the sole criterion" to determine a disability or an appropriate program. 34 C.F.R. §300.304(b)(1-3).

Each witness testified that the standardized assessment tools administered during the evaluation are generally accepted and at times were administered in accordance with the test makers' directions. The witnesses also testified that the assessment tools are commonly used to evaluate the development of young children. I find the psychologist and the preschool teacher's testing and evaluations were appropriate. Therefore, I find the IU's evaluation of the Child's cognitive development, adaptive development, social and emotional needs was appropriate. To assess these areas, the IU used multiple overlapping assessments. I also find the speech evaluation, Occupational Therapy, and Physical Therapy evaluation was partially appropriate and partially insufficient and inappropriate. For the following reasons, the IU is directed to publically fund the following evaluations: (1) a Physical Therapy evaluation, (2) an Occupational Therapy Sensory Processing evaluation, and, an Assistive Technology evaluation.

The Cognitive, Behavioral, and Social development testing was sufficient

The IU presented convincing and preponderant evidence that the VB-MAPP, the Rossetti Infant-Toddler Language Scale, the Preschool Language Scale 5th Edition (PLS-5), and the Battelle Developmental Scale-2 (BDI-2) are valid and reliable assessment tools. These multiple assessments were sufficient in scope and depth to assess the Child's developmental domains. The above multiple assessments here are sufficient in scope and depth such that the team could determine the Child's eligibility and provide updated information about the Child's ongoing cognitive, behavioral, social, and emotional needs.

In several of the mandated domain areas, the IU used multiple and at times overlapping standardized assessment tools to conduct a complete assessment of the Child's cognitive functioning, social skills, play skills, and interfering behaviors. For example, the IU psychologist, the Speech Therapist, and the preschool teacher used the VB-MAPP and the BDI-2 to assess the Child's cognitive and language development. The staff used the VB-MAPP and the FBA to evaluate how the Child's behaviors interfered with learning. I find that in each of these developmental areas the record is preponderant; the IU met its burden of proof that the Child's cognitive, social, and behavioral assessment were sufficient in scope and depth to evaluate the Child's eligibility and continuing need.

The Assistive Technology Evaluation was incomplete and insufficient

The Speech Therapist used the Rossetti Infant Toddler Language Scale and the PLS-2, and parts of the VB-MAPP to evaluate expressive and receptive language communication skills. These evaluations were complete and provided the team with necessary and comprehensive data. However, the RR does not provide any objective data from an Assistive Technology assessment. The evidence is preponderant that the Assistive Technology Assessment Needs Tool (ATNAT) is not a valid assessment of AT needs (NT lines 12-14). Although the IU has a designated person to conduct AT evaluations, in this instance the AT decision-making was left in the hands of one person, the Speech Therapist (NT p.231-233). The IU staff testified the ATNAT is not a valid assessment of the Child's needs (NT lines pp.12-14). To the extent that the team relied on the ATNAT to make decisions about the Child's AT needs, the team's decision-making process conflicted with the IDEA and Pennsylvania restrictions prohibiting the team from relying on a "sole criterion" to make the decision. 34 C.F.R. §§300.304(c)(1)(ii-iv), (2), (4), (6), (7); 22 Pa. Code §14.153, 22 Pa. Code §14.123. As a five year old about to enter school, the Child's standardized communication skills scores are in the 1st percentile. Unless the AT data is collected, the team will never know what the uncollected data otherwise available would suggest about the Student needs "in all areas of disability" 20 U.S.C. § 1414(b)(3)(B). Therefore, I am directing the IU to fund a private evaluation of the Child's AT needs.

The Occupational Therapy Evaluation is insufficient and not in-depth

The Occupational Therapist used the DAYC-2 and the Peabody to evaluate the Child's independent functioning in the environment and self-help skills. The DAYC-2 and the Peabody Motor skills assessment include multiple assessments of the Child's self-help skill levels. Each of the assessments related to the area of suspected disability. Each of the assessment was sufficiently comprehensive to identify all of the Child's special education and related service needs. Each assessment provides "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii-iv), (2), (4), (6), (7).

Therefore, I find the assessment of the Child's self-help skills was sufficient in scope and in-depth to enable the team to understand the Child's eligibility and programing needs. However, I also find the Sensory Processing assessment, scored by the OT and conducted by the teacher, was insufficient and inadequate (NT p.33-34).

The IU OT Evaluation omitted Parent Information

The Occupational Therapist relied upon the "Sensory Processing Measure-Preschool" as the single solitary assessment technique and sole criteria to evaluate the Child's sensory processing eligibility and needs. The Sensory Processing Measure-Preschool (SPM-P) data collection questionnaire relies on observations made by the teacher and the parent/caretaker (NT p.32-34). The SPM-P calculates the frequency of occurrence of the child's behavior in response to a variety of sensory experiences in multiple environments.

The Grandmother and the staff agree the Child "engages in self-stimulating behaviors" that occur frequently and interfere with learning (J#3 p.18). The Parties do not dispute the fact that the Student "walks on tip toe", "head butts", and "runs into people" (J#3 p.18). The Occupational Therapist opined that the above behaviors "may or may not be a result of sensory processing" (J#3 p.18). The Occupational Therapist's report provides, "[redacted] sensory processing differences limit purposeful engagement in classroom activities" (J#3 p.18). These uncontested statements highlight the need for an in-depth assessment. While the Child scored in the "Definite Dysfunction" range indicating eligibility and need, the use of the SPM-P teacher questionnaire as the "the sole criterion" for a determination of disability or an appropriate program is disfavored. The IU's sole reliance on the SPM-P failed to provide an "in-depth" or "sufficient" evaluation of the Child "in all areas of disability" 20 U.S.C. § 1414(b)(3)(B).

The Occupational Therapist also testified that the teacher completed and she scored the SPM-P school questionnaire (NT p.33). Next, she testified that she did not give the Grandparents the home SPM-P home questionnaire (NT pp.30-35). The SPM-P identifies sensory processing difficulties in children as young as 2 years of age. The SPM-P is a companion to the popular Sensory Processing Measure for older students. The SPM-P provides data about the Child's overall sensory functioning as well as specific vulnerabilities that can affect learning.[6] When the Home and the School questionnaires are completed, the SPM-P provides the Grandparent and the IU with an "in-depth" and "sufficient" direct comparison of the Child's sensory functioning needs at home and in the preschool environment.

[6] Sensory Processing Measure –Preschool (SMP-P) http://www.therapro.com/Browse-Category/Sensory-Processing/Sensory-Processing-Measure-Preschool-SPM-P.html.

The maker of the test reports:

> The SPM-P includes both a Home Form, completed by the parent and a School Form, completed by the preschool teacher or care provider. Each form is composed of 75 items that are rated according to the frequency of easily observable behaviors. When used together, the two forms provide a comprehensive overview of sensory processing, and they allow you to quickly compare the child's functioning across settings." *Id.* (emphasis added).

The SPM-P test generates a T-score for each SPM-P scale and characterizes the child's status in descriptive terms as well (Typical, Some Problems or Definite Dysfunction). An Environment Difference score alerts you to discrepancies in sensory functioning between home and preschool setting." *Id.* The test maker goes on to state:

> Clinicians are enthusiastic about the SPM-P not only because it generates useful information, but also because it provides that information in a way that parents can understand. Scale names are comprehensible; results are visually summarized, and interpretation is clear-cut. These features make it easier for therapists to explain test results and engage parents in the treatment process. Because the SPM-P is based on the same scale structure and theory as the SPM, you can monitor a child's sensory development from preschool all the way to age 12 years. This kind of continuity is important when you're treating children who require long-term follow-up." *Id.*

Finally, both the SPM and SPM-P can be used for evidence-based practice, scientific based research, differentiated instruction, and progress monitoring."[7]

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[7] Sensory Processing Measure - Preschool (SPM-P) http://www.pearsonclinical.co.uk/AlliedHealth/PaediatricAssessments/Sensory/SPM-P/sensory-processing-measure-preschool.aspx

The published scientific research-based benefits of the SPM-P are tangible and can have long-term implications for measuring the Child's educational needs. The SPM-P home and school questionnaire when combined provide an in-depth sensory profile that affects the Child's equal access to IDEA's promise of a free appropriate public education and the parallel promise of a full educational opportunity goal. 34 C.F.R. §300.109; 20 U.S.C. §1412(a)(2).

The failure to provide the Grandparent with the home questionnaire denied the Grandparents the equal opportunity to participate in the development of the RR, otherwise provided to the other professional members of the team.[8] The failure to provide the Grandparent with the home questionnaire skewed the data and significantly impeded the Grandparents' participation in the reevaluation.

The omission of the Grandparents' input interfered with the Grandparents participation and interfered with a comprehensive assessment of the "family's perceived strengths and needs" 22 Pa Code §14.153. The omission of the home questionnaire interfered with a comprehensive in-depth assessment of the Child's development. See 22 Pa Code §14.153.

Testimony explaining the choice to have the staff complete the form, but not the Parents, was not compelling. (See, FOF #16). These assessment tools are designed to obtain information from multiple raters across multiple settings. Given the emphasis placed on the differences in the Student's behaviors at home and in school, the intentional decision to forego information that could be used to compare the Student's behaviors across settings in a standardized way is inexplicable.

These fundamental errors substantially interfered with the Grandparents' procedural rights, the Child's right to a "full assessment". I also find the partial use of the SPM-P as the single criterion, under these circumstances falls far short of the requirement that all evaluations are "sufficient in scope and depth to investigate" to

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[8] *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012); Individuals with Disabilities Education Improvement Act of 2004, Pub. 20 U.S.C. § 1415(f)(3)(E)(ii) (2006)) ("In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.").

gauge "… the family's perceived strengths and needs which will enhance the child's development". 22 Pa Code 14.153; 22 Pa Code14.123; 20 USC §1415(f)(3)(E)(ii). Accordingly, the IU is directed to fund a Sensory Processing evaluation.

The Physical Therapy Evaluation was insufficient

The Physical Therapy, like the Occupational Therapy evaluation, conflicted with the state and the federal prohibitions when the team used the DAYC-2 Gross Motor subtest as the "single criterion". To assess the Child's gross motor skills, the Physical Therapist used the Gross Motor subtest of the DAYC-2 (J#3). The DAYC-2 is an individually administered, norm-referenced measure of global early childhood development for children from birth through age five years and eleven months. The DAYC-2 assesses the Child's cognition, communication, adaptive behavior, social-emotional behavior, and physical development. Each subtest takes between 10-20 minutes. Each separate domain area is measured and scored independently yielding a standard score with a mean of 100 and a standard deviation of 15 in each domain. The DAYC-2 Physical Development domain score is made up of the child's combined performance on the gross and fine motor sub-domains.[9] The Physical Development domain assessment includes 87 items and two subdomains: Gross Motor (54 items) and Fine Motor (33 items) *id.* The narrative portion of the Child's RR describes the Child's overall performance using the single Gross Motor subtest score from the DAYC-2 as the sole basis for the decision (J#3).

Although the evaluator testified that she also relied on "clinical judgment" as a suggested additional assessment technique, I do not find "clinical judgment", in this instance, is a sufficient valid assessment measure. Clinical judgment as applied here is not a "technically sound instrument(s)" 34 C.F.R. §300.304(b)(1-3). The IDEA prohibits the use of any single measure or assessment criteria as the sole criterion for a determination of disability or need 34 C.F.R. §300.304(b)(1-3). While "clinical judgment" is a factor in assessing a child, scientific peer reviewed assessment practices casts doubt on the use of "clinical judgment" in evaluating a preschool child's eligibility or needs.[10] I find the Child's 10-20 minute assessment was not an in-depth

[9] http://ucpalabama.org/wp-content/uploads/2015/05/dayc-2.pdf;; https://dese.mo.gov/sites/default/files/se-fs-dayc2-powerpoint.pdf; http://journals.sagepub.com/doi/pdf/10.1177/0734282913518380

[10] Bagnato S. J., McKeating-Esterle E., Fevola A., Bortolamasi P., Neisworth J. T. (2008). *Valid use of clinical judgment (informed opinion) for early intervention eligibility: Evidence base and practice characteristics*. Infants & Young Children, 21, 334-349); Authentic Assessment for Early Childhood Intervention, Stephen J. Bagnato, Guilford Press New York 2007, *Can Clinical Judgments Guide Parent-Professional Team Decision Making for early Intervention?* (pp. 142-174); *Research Foundations for Using Clinical Judgment (Informed Opinion) for Early Invention Eligibility Determination*, Stephen J Bagnato, Janell Smit-Jones

assessment, when compared to the stark reality that the Child will need to undergo surgery for the medical complications arising from toe walking 34 C.F.R. §300.301-306; 22 Pa Code §14.123; 22 Pa Code §14.153. Therefore, even assuming *arguendo* that "clinical judgment" is a valid technically sound research-based practice assessment tool, I find the use of a single gross motor subtest coupled with "clinical judgment" is insufficient and inadequate. I also find the reevaluation did not include an assessment of the family's perceived strengths and needs which will enhance the child's development." 22 Pa Code §14.153; 34 C.F.R. §§300.301-306. (emphasis added). Had the IU sought the advice of a medical professional or consulted with the outside Physical Therapy provider, the results might well have been different. See, 34 C.F.R. §300.34(c)(5); *Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3d Cir. 2009). 34 C.F.R. §300.34 (c)(5).

Consistent with the LEA's published IEE requirements, the LEA may limit the cost of the reevaluation(s) provided, however, the LEA limits may not prevent the Grandparents from obtaining an independent assessment. In addition, Grandparents must be given the opportunity to demonstrate exceptional circumstances that would justify an IEE cost in excess of the established IEE cap.[11] Accordingly, the IU is directed to fund a Physical Therapy IEE.

Conclusion

The 2016 reevaluation of the Child's cognitive, academic, and behavioral, expressive language and receptive language eligibility and needs was comprehensive. The Occupational Therapy evaluation of the Child's self-help skills was also comprehensive. The IU is Ordered to fund the cost of an IEE of the Child's Sensory Processing, Assistive Technology, and Physical Therapy needs. The reevaluation assessments of the Child's Sensory Processing and Physical Therapy eligibility and needs failed to clarify the depth of the Child's needs and strengths.

Margaret Matesa, Eileen MCKeating-Esterle, *Practice-Based Research Syntheses of Child Find, Referral, Early Identification, and Eligibility Practices and Models*, Volume Two, Number Three (November 2006).

[11] See, 34 CFR §300.502 (a)(3)(i); Letter to Anonymous, 56 IDELR 175 (OSEP 2010); Letter to Anonymous, 20 IDELR 1219 (OSEP 1993)(districts must give parents the opportunity to prove extraordinary circumstances warranting an IEE at public expense that doesn't meet district criteria). LEA's refusal to waive certain evaluation criteria in light of extraordinary circumstances violates the IDEA. See, e.g., Dover City Schs., 57 IDELR 208 (SEA OH 2011) (IEE cost exception granted noting that three of five evaluators on district's list of approved examiners practiced outside of 30-mile radius district imposed and charged more than the $1,000 district had authorized); and Cincinnati Pub. Schs., 115 LRP 27909 (SEA OH 05/15/15) (student's unique needs warranted pushing up cap on district's IEE policy limits).

The reevaluation assessments of the Child's Sensory Processing, Assistive Technology, and Physical Therapy eligibility and needs failed to provide sufficient updated data about the Child's functional performance and disability-related needs.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The IU is directed to provide an independent educational evaluation, at public expense, of the Child's Sensory Processing needs by an Occupational Therapist.

2. The IU is directed to provide an independent educational evaluation, at public expense, of the Child's Physical Therapy needs by a Physical Therapist.

3. The IU is directed to provide an independent educational evaluation, at public expense, of the Child's Assistive Technology needs.

4. Within two business days from the date of this Order, pursuant to 34 C.F.R. §300.502(e)(1), the IU is directed to provide the Grandparents with the criteria under which the IEE evaluation is obtained, including the location of the evaluators, cost limits and the qualifications of the evaluators.

5. The IU is directed to pay the costs of the evaluation(s), and any observation(s) of the Child in the preschool and/or the home.

6. In the event the Grandparents are required to transport the Child to and from the evaluation, the IU is directed to reimburse the Grandparents for any out-of-pocket costs they incur in obtaining any and all of the evaluations.

7. Once the IU presents the Grandparents with the list of the 34 C.F.R. §300.502(e)(1) evaluators, the Grandparents are directed to select the IEE evaluator(s) within 15 business days. Once the evaluator has agreed to conduct the evaluation, the Grandparents shall notify the IU of the date and time of the evaluation. The Grandparents are directed to sign a release of information to allow the IU to discuss the Child and make any and all necessary arrangements to comply with this Order. The Grandparents are directed to sign a release of

information to allow the IEE evaluator(s) to discuss the Child with all public and private providers.

8. If none of the evaluators listed by IU is willing or available to conduct the evaluation, the Grandparents must notify the IU, within two (2) business days, after such notice the Grandparents can select an evaluator(s) of their choice. Within 24 hours of selecting the evaluator(s), the Grandparents must notify the IU and provide all relevant contact information.

9. The IEE evaluator(s), in their sole discretion shall select the assessment(s) protocols and the scope of the evaluation. The IEE evaluator(s) shall prepare a written report detailing the findings, results, conclusions, and recommendations from the independent evaluation. If the evaluator(s) determines that the Child needs any further evaluation(s), not described herein, the IEE evaluator(s) should immediately inform the Grandparents and the Intermediate Unit about the suggestions for further consideration. Notwithstanding the provisions of this paragraph, any observation by the IEE evaluator may, in the sole discretion of the IEE evaluator(s), take place in the home, and or the preschool. After the IEE evaluator(s) has issued the independent evaluation report, the IU shall within five (5) business days hold a meeting to review the report.

10. The IU is directed to pay the costs for the IEE evaluator(s) to participate by phone, video conference or in person in any meeting(s) to review the report. The decision to participate and the manner of participation, in either the IEE review meeting or the IEP meeting, is best left to the sole discretions of the IEE evaluator(s).

11. The IU is directed to pay the costs for the IEE evaluator(s) to participate by phone, video conference or in person in any meeting, with the Grandparents, when the IEE is reviewed or discussed. The decision to participate and the manner of participation, in either the IEE review meeting or the IEP meeting, is best left to the sole discretions of the IEE evaluator(s).

12. The terms of this Order regarding the involvement of and payment for the IEE evaluator(s) services will terminate after the IEE evaluator(s) has: (1) participated as a member of the Child's evaluation team meeting and the IEP team meeting; and, (2) when the IU presents the Grandparents with a Notice of Recommended Educational Placement and an Individualized Education Program reviewing the results of the IEE.

13. Nothing in this order should be read to limit, or interfere with, the continued involvement of the IEE evaluator(s), once the duties herein are discharged so long as the Parties mutually agree to such continued involvement and might make arrangements therefore.

14. If the Parties agree in writing, the timelines to complete the evaluations herein are subject to modifications.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer

January 27, 2017